

KHPA FACT SHEET
Summary of requirements for Medicaid stimulus dollars
March 16, 2009

- The purpose of Medicaid funding provisions in the American Recovery and Reinvestment Act (ARRA) of 2009, as conveyed in the preamble to the “State Fiscal Relief” title of the Act, is “to provide fiscal relief to States in a period of economic downturn, [and] to protect and maintain state Medicaid programs...by helping to avert cuts in provider payment rates, benefits, and services.”
- State accepting ARRA Medicaid funding cannot reduce eligibility “standards, methodologies, [n]or procedures.”
- Legislative history, including publicly reported statements by key federal legislators, is consistent with the preamble to the State fiscal relief Title of ARRA and supports the view that supplemental Medicaid funding is to be used first to maintain state Medicaid programs.
- The amount of supplemental Medicaid funding – Kansas expects to receive \$400 to \$500 million between March 2009 and December 2010 – and stated purpose of the Medicaid Title of the Act strongly suggest that Congress anticipated other possible uses of this funding by states in need of more general fiscal relief. Other (indirect) uses of supplemental Medicaid funds for other purposes are not prohibited in the Act.
- The Act appears to require states to spend supplemental Medicaid funds by prohibiting the direct or indirect use of such funds to contribute to a state’s rainy day fund or reserve. Center for Medicare and Medicaid Services (CMS) guidance clarifying the legal status of Kansas’ ending cash balance has not yet been issued. States that abide by the legislation’s purpose and legal requirements appear to be entitled to use any residual savings in state general funds for other purposes, so long as those savings are spent and not banked or placed in reserve.
- States that elect to reduce or restrict payments and services will risk costly and extended legal challenges from providers. Any restriction would be based on a combination of ARRA and other Federal requirements.
- The frequency and nature of federal reporting under ARRA has not yet been announced, but it is likely that KHPA will need to describe and attest to the state’s compliance with ARRA requirements in the next few months, and at regular intervals thereafter throughout the stimulus funding period (October 2008 – December 2010).
- The penalty for non-compliance with ARRA funding requirements is ineligibility for the supplemental payments.
- In the absence of explicit guidance by CMS – reportedly under development at this time -- there remains at least some uncertainty about the interpretation of key ARRA provisions:
 - reporting and certification requirements for KHPA;
 - whether reductions in provider rates or services will be allowed by CMS and the courts;
 - the interpretation of the state’s cash balances as a reserve or rainy day fund; and
 - any requirement for states to spend rather than save supplemental Medicaid funds.

KEY PROVISIONS IN ARRA AND FEDERAL MEDICAID LAWS

- The title and preamble to the Medicaid funding section of ARRA establish clear legislative intent:

TITLE V--STATE FISCAL RELIEF

SEC. 5000. PURPOSES; TABLE OF CONTENTS.

(a) PURPOSES.—The purposes of this title are as follows:

- (1) To provide fiscal relief to States in a period of economic downturn.*
- (2) To protect and maintain State Medicaid programs during a period of economic downturn, including by helping to avert cuts to provider payment rates and benefits or services, and to prevent constrictions of income eligibility requirements for such programs, but not to promote increases in such requirements.*

- Under §5001(f)(1) of ARRA, the direct “Maintenance of Effort” restriction on states’ qualifications for the Medicaid stimulus dollars is described.

(f) STATE INELIGIBILITY; LIMITATION; SPECIAL RULES.—

(1) MAINTENANCE OF ELIGIBILITY REQUIREMENTS.—

(A) IN GENERAL.—Subject to subparagraphs (B) and (C), a State is not eligible for an increase in its FMAP under subsection (a), (b), or (c), or an increase in a cap amount under subsection (d), if eligibility standards, methodologies, or procedures under its State plan under title XIX of the Social Security Act (including any waiver under such title or under section 1115 of such Act (42 U.S.C. 1315)) are more restrictive than the eligibility standards, methodologies, or procedures, respectively, under such plan (or waiver) as in effect on July 1, 2008.

- Sec. 5001 also addresses the competing possibility, i.e., that states might bank supplemental ARRA funding for possible use in future years:

(f)(3) “STATE’S APPLICATION TOWARD RAINY DAY FUND- A State is not eligible for an increase in its FMAP under subsection (b) or (c), or an increase in a cap amount under subsection (d), if any amounts attributable (directly or indirectly) to such increase are deposited or credited into any reserve or rainy day fund of the State.”

- Longstanding Federal Medicaid law establishes a conceptual floor for Medicaid reimbursement to providers that would likely prevent Kansas from reducing rates while also accepting over \$400 million in added funding through ARRA. The particular provision at §1902(a) (30) (A) of the Social Security Act requires that a State’s Medicaid plan must:

(30) (A) ...assure that payments are consistent with efficiency, economy, and quality of care and are sufficient to enlist enough providers so that care and services are available under the plan at least to the extent that such care and services are available to the general population in the geographic area;”

QUESTIONS AND ANSWERS

Although Federal guidance has not yet clarified all of its provisions, ARRA's stated purpose and legislative history, its maintenance of effort provisions, its prohibition on deposit of supplemental Medicaid funding in a rainy day fund, as well as pre-existing protections in Medicaid statutes all provide significant guidance for preliminary implementation by states. Four key questions are addressed below:

Does ARRA and/or current state law allow for provider rate cuts now in Kansas?

While there are no direct prohibitions against rate cuts in ARRA, section §5000 on the purpose of the Medicaid portion of the ARRA presents clear legislative intent. The stimulus money is to be used, first, to make Medicaid whole, and to maintain the programs at pre-existing levels. HHS and Congress seem to promise aggressive oversight of these goals. KHPA urges the legislature to use the stimulus dollars to keep Medicaid at either its July 1, 2008 or October 1, 2008 levels (eligibility levels must be maintained at July 1, 2008 levels). Given the amount of supplemental Medicaid funding available through ARRA, the state should be able to maintain the program and yet still reap additional state fiscal relief for use in maintaining other state programs as well. Nothing in ARRA prevents the use of state general fund savings resulting from the increase in the FMAP for purposes other than Medicaid, except for the limitation on the use of ARRA funding to shore up state savings.

Given the court's logic used against California's attempt to reduce provider rates by 10% in the absence of stimulus dollars, it is reasonable to speculate that the court's logic in the presence of stimulus dollars might lead a court to enjoin even smaller reductions than California's 10%. Now that the Federal government has provided fiscal relief to states designed explicitly to help them preserve Medicaid at pre-existing levels, courts will almost certainly take into account the size and specific use of ARRA supplemental funding through the FMAP increase when considering any proposed reductions in provider rates, benefits or services.

ARRA increases the risk to the state of any actions to reduce provider rates. If the state proceeded with a provider rate cut without appropriate rate studies that would include the ARRA stimulus, a court could set the rate reduction aside. If the state failed to prove adequate reimbursement for providers when funds were available to help maintain those rates, the state would face equal access challenges from both HHS/CMS (in their role of approving changes in certain provider rates) and from interest groups who may choose to seek court orders preventing such reductions. Given that ARRA supplemental Medicaid funding is sufficient to maintain the Medicaid program at pre-existing levels, Kansas would also risk sanction by CMS or the HHS OIG for failing to follow the purposes of the funding.

Does ARRA and/or current state law allow or prevent cuts in optional services in Kansas?

Apart from the §5000 language noted earlier, there is no federal limitation on a state's flexibility in adding or eliminating optional services. However, given the purpose of maintaining the program levels at July 1, 2008 levels, even cuts in optional programs may trigger court action and/or review. Optional services remain optional, even under ARRA, but justifying cuts when there is stimulus funding available could undermine the state's argument of fiscal necessity. In addition, it will be difficult to satisfy the requirement that ARRA funding be used in part to preserve Medicaid if the state reduces Medicaid services, especially in light of the overall size of ARRA Medicaid funding, which will result in a 15-25 percent reduction in the state share of Medicaid, far larger than the funding reductions considered by the 2009 Kansas legislature (i.e., an increase in the Federal match rate from 60% to 66-69% reduces the corresponding state contribution of 40% down to between 29% and 33% of total Medicaid costs). While the state retains authority to reduce optional services, it is not clear how the state would demonstrate compliance with ARRA's legislative and statutory intent to preserve the program. Since CMS has not yet provided an interpretation of ARRA's impact on service reductions, a conservative approach preserving the state's eligibility for supplemental funding would be to avoid such reductions. A companion practical concern involves the amount of savings from such a move if the effect is to shift costs

avoided by the optional service onto other available services. Such unintended consequences are particularly relevant since optional services were often developed so as to avoid or reduce costs in other areas.

Does ARRA and/or current state law allow or prevent cuts in eligibility in Kansas?

Eligibility cuts and deliberate constrictions in the enrollment process are specifically prohibited by ARRA. Restrictions in eligibility standards, methodologies or procedures disqualify a state's eligibility for ARRA funding. States currently out of compliance with this provision are required to restore eligibility in order to receive ARRA Medicaid funding.

Can ARRA Medicaid funding be used for other purposes?

In a mechanical sense, ARRA Medicaid dollars come in the form of additional Federal matching payments for Medicaid services, so all ARRA Medicaid funding is directly applied to the program. These funds will, however, reduce state general fund Medicaid expenditures by 15 to 20 percent, saving the state at least \$400 million over a 27-month period. ARRA's purpose in providing supplemental Medicaid funding makes it clear that the additional funding is to be used (directly) for preserving and maintaining the State's Medicaid program, and that it may also be used (indirectly) for general state fiscal relief. Since the stimulus will reduce the state's contribution to the Medicaid program through an increase in available FMAP payments, "saved" funds could be used in other ways. This source of general fiscal relief is not prohibited by ARRA, but given ARRA's stated purposes, it appears that the enhanced FMAP payments are intended first and foremost to prevent cuts in Medicaid. Furthermore, the explicit maintenance of effort language in ARRA prevents the use of Medicaid stimulus dollars to directly or indirectly increase state reserves or a rainy day fund. The reasonable conclusion would be that stimulus dollars are to be used, not saved, and that they be used first to prevent any reduction in Medicaid services. State use of ARRA funds for other purposes, or in the event that ARRA's requirements are not met, places those funds at risk.

KHPA also notes the possibility that reduced levels of operational funding for the agency could have a deleterious impact on Medicaid services. Although it is not clear that reductions in customer service or programmatic effectiveness would engender federal oversight or court intervention under ARRA, it seems clear that such reductions are inconsistent with Federal intent in maintaining pre-existing rates, benefits and services in the Medicaid program. KHPA looks forward to working with the Governor and legislature to identify appropriate uses and accounting of ARRA supplemental Medicaid funding.